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Nos. 91-10 and 91-32

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1991

SPECTRUM SPORTS, INC., ET AL., PETITIONERS

v.

SHIRLEY MCQUILLAN AND LARRY MCQUILLAN
dba SORBOTURF ENTERPRISES

SORBOTHANE, INC., ET AL., PETITIONERS

v.

SHIRLEY MCQUILLAN, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTIONS PRESENTED

1. Whether wholly owned subsidiaries of a common corporate parent may conspire with each other for purposes of the Sherman Act.

2. Whether the jury was correctly instructed that it could find liability for attempted monopolization under Section 2 of the Sherman Act on the basis of predatory conduct by the defendant, without proof of a relevant market or the defendant's market power.

3. Whether a private antitrust plaintiff establishes antitrust injury merely by showing actual injury resulting from a per se violation of Section 1 of the Sherman Act or attempted monopolization in violation of Section 2 of the Sherman Act.

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This brief is submitted in response to the Court's invitation to the Solicitor General to express the views of the United States in this case.

STATEMENT

1. Sorbothane is a patented elastic polymer useful for its shock-absorbing characteristics. Respondents Shirley and Larry McQuillan, doing business as Sorboturf Enterprises, were regional distributors of products made

from sorbothane from 1981 to mid-1983. Pet. App. A3-A7.[1] In addition, Shirley McQuillan was involved in efforts to develop equestrian products made from sorbothane. Petitioner BTR, Inc., controlled the patent rights to sorbothane. BTR initially licensed petitioner Hamilton-Kent Manufacturing Company (Hamilton-Kent) to manufacture sorbothane in the United States. In 1982, petitioner Sorbothane, Inc., assumed Hamilton-Kent's sorbothane business. Pet. App. A3. At all relevant times, BTR owned, directly or indirectly, both Hamilton-Kent and Sorbothane. *Ibid.* Petitioner Kenneth M. Leighton, Sr., served as president of Hamilton-Kent until the creation of Sorbothane, at which time he became president of that company.[2] *Ibid.* Petitioner Kenneth B. Leighton, Jr., Leighton Sr.'s son, is a co-owner of petitioner Spectrum Sports, Inc. (Spectrum). At all relevant times, Spectrum was a distributor of sorbothane products.[3] *Ibid.*

In 1983, Sorbothane, Inc., notified respondents that it would no longer sell them sorbothane or sorbothane products. Shortly thereafter, Spectrum Sports became the national distributor of sorbothane athletic products. Respondents attempted unsuccessfully to obtain sorbothane from a British firm, Leyland and Birmingham (Leyland), which held a license to manufacture and sell sorbothane without territorial restriction. Pet. App. A4.

2. Respondents sued petitioners seeking damages for alleged violations of Sections 1 and 2 of the Sherman Act, 15 U.S.C. 1 and 2, and Section 3 of the Clayton Act, 15

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[1] Unless otherwise noted, references are to the appendix to the petition for a writ of certiorari in No. 91-10.

[2] Sorbothane, Hamilton-Kent, BTR, Inc., and Kenneth M. Leighton, Sr., are the petitioners in No. 91-32. In this brief, they are collectively referred to as the "Sorbothane petitioners."

[3] Kenneth B. Leighton, Jr., and Spectrum Sports, Inc., are the petitioners in No. 91-10. In this brief, they are referred to as the "Spectrum petitioners."

U.S.C. 14.[4] At the conclusion of the trial, the jury found by special verdict that the Sorbothane petitioners had engaged in resale price fixing and horizontal territorial market allocation of sorbothane products in violation of Section 1 of the Sherman Act, and had monopolized, attempted to monopolize, or conspired to monopolize the market for sorbothane products, in violation of Section 2 of the Sherman Act.[5] The jury found that the Spectrum petitioners were not liable for any Section 1 violation, but did find them liable under Section 2.[6] The jury awarded respondents $1,743,000 in compensatory damages on all claims, and awarded an additional $500,000 in punitive damages, which respondents later waived. The district court trebled the compensatory damages upon entry of judgment under Section 4 of the Clayton Act, 15 U.S.C. 15, RICO, 18 U.S.C. 1964(c), and the California Cartwright Act, Cal. Bus. & Prof. Code § 16750(a) (West 1987 & Supp. 1992), and awarded an additional $912,032.50 in attorneys' fees pursuant to Section 4 of the Clayton

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[4] Respondents also alleged violations of the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. 1962(a), (b), (c) and (d), as well as fraud, breach of contract, interference with prospective business advantage, bad faith denial of the existence of an oral contract, conversion, and violations of California's unfair competition law, Cal. Bus. & Prof. Code § 17200 (West 1987), and the California Cartwright Act, Cal. Bus. & Prof. Code § 16750 (West 1987 & Supp. 1992). See R.E. 1-47 (Second Amended Complaint).

[5] The jury also found that the Sorbothane petitioners were liable for all the alleged RICO and state law violations. The jury further found that Sorbothane or Hamilton-Kent was the agent or alter ego of BTR. Special Verdict Form I-X, XIV-XVIII.

[6] The jury found that the Spectrum petitioners were liable for interference with prospective business advantage and for violations of California's unfair competition law and of Sections 1962(b), (c) and (d) of RICO, but were not liable for fraud or for violations of the Cartwright Act or Section 1962(a) of RICO. Special Verdict Form II, VIII-IX, XIV-XVIII.

Act. All petitioners filed motions for judgment notwithstanding the verdict or for a new trial, which were denied by the district court. Pet. App. A2, A30-A31; 91-32 Pet. App. 35-36; Special Verdict Form I-XIX.

3. The Sorbothane and Spectrum petitioners appealed, and the Ninth Circuit affirmed in an unpublished memorandum decision. Pet. App. A1-A28. The court of appeals found a sufficient basis for the Sherman Act Section 1 market allocation claim against the Sorbothane petitioners, Pet. App. A8-A12, and for the Section 2 verdict as to the Spectrum petitioners. Pet. App. A15-A22. Because the jury found the same damages on all the claims against petitioners, the court noted that affirming a single trebled claim against each petitioner was sufficient to support the verdict. The court of appeals thus declined to address petitioners' assertions regarding the other substantive violations found by the jury. Pet. App. A27-A28.

a. The Sorbothane petitioners contended that, under this Court's decision in *Copperweld Corp.* v. *Independence Tube Corp.*, 467 U.S. 752 (1984), Sorbothane and Leyland could not have conspired to allocate the market for sorbothane for purposes of Section 1 of the Sherman Act because both corporations are wholly owned direct or indirect subsidiaries of a single corporate parent. The court rejected that contention, concluding that Sorbothane and Leyland, while "existing under a family of companies controlled by BTR, PLC," nonetheless operated "autonomously." Pet. App. A10. Citing *Kiefer-Stewart Co.* v. *Joseph E. Seagram & Sons*, 340 U.S. 211, 215 (1951), and the Ninth Circuit's own pre-*Copperweld* decision in *Las Vegas Sun, Inc.* v. *Summa Corp.*, 610 F.2d 614, 617 (9th Cir. 1979), cert. denied, 447 U.S. 906 (1980), the court held that common ownership and control does not prevent members of a corporate family from conspiring in violation of the antitrust laws where those corporate family members operate autonomously. Pet. App. A11.

b. The court of appeals noted that the jury had not specified whether it found the defendants liable under Section 2 of the Sherman Act for monopolizing, attempting to monopolize, or conspiring to monopolize. Pet. App. A15. The court asserted that the verdict must stand if the evidence was sufficient to support any of the three theories (*ibid.*), and proceeded to consider only whether petitioners could properly have been found liable for attempting to monopolize. The court rejected the Spectrum petitioners' argument that the Section 2 claim must fail because there was no evidence that they intended to injure competition and no evidence of market power that could lead to the conclusion that any of the petitioners were likely to succeed in monopolizing a relevant market. Relying on its decision in *Lessig* v. *Tidewater Oil Co.*, 327 F.2d 459 (9th Cir.), cert. denied, 377 U.S. 993 (1964), the court held that "if evidence of unfair or predatory conduct is presented, it may satisfy both the specific intent and dangerous probability elements of the offense, without any proof of relevant market or the defendant's marketpower." Pet. App. A19. The court concluded (Pet. App. A21):

> There is sufficient evidence from which the jury could conclude that [the Sorbothane petitioners] and [the Spectrum petitioners] engaged in unfair or predatory conduct and thus inferred that they had the specific intent and the dangerous probability of success and, therefore, McQuillan did not have to prove relevant market or the defendant's marketing power.

c. Finally, the court rejected petitioners' contention that the district court erred in failing to instruct the jury that respondents were required to show antitrust injury and in failing to grant JNOV in the absence of any such showing. The court stated that horizontal market allocations and attempts to monopolize are treated as per se

violations of the Sherman Act, and that per se violations are presumed to cause injury to competition. Pet. App. A22. The court then held that "[t]he jury was properly instructed on the antitrust violations and there was sufficient evidence in the record to show that [respondents were] injured as a result of the defendants' conduct." *Ibid.* The court of appeals did not refer to this Court's decision in *Atlantic Richfield Co.* v. *USA Petroleum Co.*, 495 U.S. 328 (1990), which was decided after briefing and oral argument but prior to the court of appeals' decision in this case.

Although the court of appeals denied petitioners' request for rehearing and suggestion for rehearing en banc, the panel amended its opinion to delete a statement that petitioners had failed to object to the instruction incorporating the *Lessig* holding. Pet. App. A32-A33.

DISCUSSION

1. The court of appeals' opinion contains three manifest errors in legal analysis. First, the court's analysis of the intra-enterprise conspiracy issue is inconsistent with the rationale of *Copperweld Corp.* v. *Independence Tube Corp.*, *supra*. Second, the court's application of *Lessig* v. *Tidewater Oil Co.*, *supra*, perpetuates an unsound Ninth Circuit doctrine that has been rejected by every other court of appeals. Third, the court's handling of the antitrust injury issue ignores this Court's decision in *Atlantic Richfield Co.* v. *USA Petroleum Co.*, *supra*. Remarkably, the court of appeals chose not to publish its decision in this multi-million dollar case, even though it broke new legal ground on the *Copperweld* issue and ignored controlling Supreme Court precedent on the antitrust injury issue.

a. *First.* The court of appeals concluded that wholly owned subsidiaries of a common corporate parent can conspire for purposes of Section 1 of the Sherman Act if

the subsidiaries operate autonomously. The Sorbothane petitioners correctly argue that the court's conclusion conflicts with the rationale of *Copperweld*. The Court reasoned in *Copperweld* that the Sherman Act's prohibition of concerted activity in restraint of trade encompasses only arrangements in which "two or more entities that previously pursued their own interests separately are combining to act as one for their common benefit." 467 U.S. at 769. Coordination between a corporation and its wholly owned subsidiary does not fall within that prohibition because "[t]heir objectives are common, not disparate; their general corporate actions are guided or determined not by two separate corporate consciousnesses, but one." *Id.* at 771.

In concluding that wholly owned subsidiaries of a common parent can conspire with each other for purposes of Section 1, the court of appeals relied (Pet. App. A11) on dicta from *Kiefer-Stewart Co.* v. *Joseph E. Seagram & Sons* suggesting that the intra-enterprise conspiracy doctrine applies where defendants "hold themselves out as competitors." 340 U.S. at 215. This Court expressly repudiated that language in *Copperweld*. 467 U.S. at 763-764. In addition, *Copperweld* rejected, as applied to a parent and a wholly owned subsidiary, the "so-called 'single entity' test" adopted in cases such as *Las Vegas Sun, Inc.* v. *Summa Corp.*, *supra*, the other decision on which the court of appeals relied in this case. See 467 U.S. at 772 n.18. The Court observed in *Copperweld* that criteria measuring the "separateness" of a wholly owned subsidiary "simply describe the manner in which the parent chooses to structure a subunit of itself. They cannot overcome the basic fact that the ultimate interests of the subsidiary and the parent are identical, so the parent and the subsidiary must be viewed as a single economic unit." *Ibid.*

There is no reason to apply a different analysis to coordination between two wholly owned subsidiaries of the

same corporate parent. See 7 P. Areeda, *Antitrust Law* ¶ 1464f, at 245-246 (1986). If each subsidiary shares the ultimate interests of the same corporate parent, the ultimate interests of the subsidiaries must also be identical, and they are thus part of a single economic unit. As a result, they are squarely embraced within this Court's reasoning in *Copperweld* that efficiencies or other advantages achieved through utilization of organizational options within a single wholly owned enterprise are a legitimate means of competition, rather than an element of a Sherman Act violation. 467 U.S. at 772-774. And "[a]ny anticompetitive activities of [the enterprise] * * * may be policed adequately" under "§ 2 of the Sherman Act and § 5 of the Federal Trade Commission Act." 467 U.S. at 777. Consequently, the court of appeals erred in approving an instruction that allowed the jury to find a conspiracy among affiliated corporations unless defendants establish that they function as a single economic enterprise. See Pet. App. A11; 91-32 Pet. 11-12 n.11.[7]

b. *Second.* Both sets of petitioners challenge the court of appeals' reliance on the *Lessig* rule to uphold a jury instruction allowing a finding of attempted monopolization without consideration of a relevant market or proof of a likelihood that actual monopolization will result. We agree with petitioners that the district court's *Lessig* instruction was erroneous.[8]

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[7] This case does not present the question of corporate affiliations involving less than one hundred percent ownership. The court of appeals relied on evidence that the affiliated corporations operated autonomously (Pet. App. A11) and did not discuss the degree of affiliation. The jury instructions allowed the jury to find an intra-enterprise conspiracy even if wholly owned corporations were involved and, to the extent that the record contains evidence on the corporate relationships, it indicates that the ownership interests at issue involved complete ownership. See Tr. 962, 1676-1684.

[8] The district court instructed the jury that "if the plaintiff has shown that the defendant engaged in predatory conduct, you may infer from that evidence the specific intent and the dangerous probability element of the offense without any proof of relevant market or the defendant's marketing power." Pet. App. A20.

This Court has recognized that "[t]o establish * * * attempt to monopolize * * * it [is] necessary to appraise the exclusionary power * * * in terms of the relevant market." *Walker Process Equipment, Inc.* v. *Food Machinery & Chemical Corp.*, 382 U.S. 172, 177 (1965). See also *Copperweld*, 467 U.S. at 767 ("The conduct of a single firm * * * is unlawful only when it threatens actual monopolization."). Every court of appeals except the Ninth Circuit holds that proving an attempt to monopolize requires proving a dangerous probability of monopolization of a relevant market.[9]

The decisions of the other courts of appeals are correct. The danger that conduct will create monopoly power can be evaluated only in the context of a relevant market. Market definition in Section 2 cases is the process of identifying a product or group of products and a geographic area in which a hypothetical monopolist could charge a price significantly higher than the price that would prevail in a competitive market. If a seller has a

[9] See, *e.g.*, *CVD* v. *Raytheon Corp.*, 769 F.2d 842, 851 (1st Cir. 1985), cert. denied, 475 U.S. 1016 (1986); *International Distrib. Centers* v. *Walsh Trucking Co.*, 812 F.2d 786, 790-791 (2d Cir.), cert. denied, 482 U.S. 915 (1987); *Harold Friedman, Inc.* v. *Kroger Co.*, 581 F.2d 1068, 1079 (3d Cir. 1978); *White Bag* v. *International Paper*, 579 F.2d 1384, 1387 (4th Cir. 1974); *Multiflex* v. *Samuel Moore & Co.*, 709 F.2d 980, 991 (5th Cir. 1983), cert. denied, 465 U.S. 1100 (1984); *United States* v. *Dairymen, Inc.*, 660 F.2d 192, 194 (6th Cir. 1981); *Lektro-Vend Corp.* v. *Vendo Co.*, 660 F.2d 255, 270 (7th Cir. 1981), cert. denied, 455 U.S. 921 (1982); *General Indus. Corp.* v. *Hartz Mountain Corp.*, 810 F.2d 795, 804 (8th Cir. 1987); *Bright* v. *Moss Ambulance Serv.*, 824 F.2d 819, 824 (10th Cir. 1987); *American Key Corp.* v. *Cole Nat'l Corp.*, 762 F.2d 1569, 1579-1581 (11th Cir. 1985); *Neumann* v. *Reinforced Earth Co.*, 786 F.2d 424, 428-429 (D.C. Cir.), cert. denied, 479 U.S. 851 (1986); *FMC Corp.* v. *Manitowoc Co.*, 654 F. Supp. 915, 936 (N.D. Ill.), aff'd, 835 F.2d 1411 (Fed. Cir. 1987).

monopoly over a product or geographic area that is too narrowly drawn to constitute a market, any attempt by the seller to charge a monopoly price will prove unprofitable because too many consumers will shift to substitute products or sellers. Thus, a seller who attempts to monopolize something narrower than a relevant market cannot cause significant economic harm.

Before this Court decided *Walker Process* and *Copperweld*, however, the Ninth Circuit "reject[ed] the premise that probability of actual monopolization is an essential element of proof of attempt to monopolize." *Lessig*, 327 F.2d at 474. In its view, "[w]hen the charge is attempt (or conspiracy) to monopolize, rather than monopolization, the relevant market is 'not in issue.'" *Ibid.* It added that "the specific intent [to monopolize] itself is the only evidence of dangerous probability the statute requires—perhaps on the not unreasonable assumption that the actor is better able than others to judge the practical possibility of achieving his illegal objective." *Ibid.* Following this reasoning, the Ninth Circuit in a number of cases has allowed a double inference in attempt to monopolize cases: a finder of fact may use evidence of predatory conduct to infer specific intent to monopolize, and then may infer a dangerous probability of success from the evidence of intent. See, *e.g.*, *Janich Bros.* v. *American Distilling Co.*, 570 F.2d 848, 854 (9th Cir. 1977), cert. denied, 439 U.S. 829 (1978).

The effect of the double inference sanctioned by *Lessig* is to eliminate the element of dangerous probability of actual monopolization from an attempted monopolization case. That result blurs the fundamental distinction between unilateral conduct and concerted action incorporated in Sections 1 and 2 of the Sherman Act. Concerted action that constitutes an unreasonable restraint of trade is condemned under Section 1 without further inquiry into the likelihood of actual monopolization. But the law mandates a more cautious approach to single firm con-

duct. See *Copperweld*, 467 U.S. at 767; see also *Monsanto Co.* v. *Spray-Rite Service Corp.*, 465 U.S. 752, 761 (1984). Unilateral conduct that does not threaten actual monopolization is not subject to the Sherman Act "[i]n part because it is sometimes difficult to distinguish robust competition from conduct with long-run anticompetitive effects." *Copperweld*, 467 U.S. at 767-768. The Ninth Circuit's *Lessig* rule, by allowing an inference of dangerous probability based solely on conduct, undercuts that distinction and permits the imposition of liability for unilateral conduct that has no ultimate anticompetitive effect.[10]

c. *Third.* Both sets of petitioners challenge the court of appeals' failure to address the question of antitrust injury in light of this Court's decision in *Atlantic Richfield Co.* v. *USA Petroleum Co.*, 495 U.S. 328 (1990). In *Atlantic Richfield*, the Court rejected the Ninth Circuit's conclusion in that case that antitrust injury could be presumed from a finding of a per se violation of the Sherman Act.

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[10] The district court gave the jury a *Lessig* instruction on attempted monopolization, and the jury did not specify whether its finding of liability under Section 2 of the Sherman Act was based on monopolization, attempted monopolization, or conspiracy to monopolize. Thus, it is possible that the verdict as to Section 2 rested on a finding of attempted monopolization, rather than monopolization or conspiracy to monopolize. The Ninth Circuit discussed only attempted monopolization, asserting that the Section 2 verdict must stand if any one of the three theories could support liability. But this Court has held that, if one of the alternative grounds for a general verdict is legally insufficient, the verdict may not be affirmed. *Sunkist Growers, Inc.* v. *Winckler & Smith Citrus Products Co.*, 370 U.S. 19 (1962). *Cf. Griffin* v. *United States*, 112 S. Ct. 466 (1991) (upholding general verdict where one of the possible bases of conviction was supported by inadequate evidence, and distinguishing factual insufficiency from legal inadequacy). Accordingly, the validity of the *Lessig* instruction is presented by these petitions.

> The *per se* rule is a presumption of unreasonableness based on "business certainty and litigation efficiency." * * *
>
> The purpose of the antitrust injury requirement is different. It ensures that the harm claimed by the plaintiff corresponds to the rationale for finding a violation of the antitrust laws in the first place, and it prevents losses that stem from competition from supporting suits by private plaintiffs for either damages or equitable relief.

495 U.S. at 342. Accordingly, a plaintiff seeking relief under Section 4 of the Clayton Act for alleged violations of the Sherman Act, whether or not those violations would be viewed as per se violations, must show antitrust injury.

The court of appeals did not refer to *Atlantic Richfield*, which was decided after briefing and oral argument of this case in the court of appeals but before the court issued its opinion. Instead, the court's decision blurs the distinction between whether the defendants' alleged conduct causes *injury to competition* and whether the harm claimed by the plaintiffs constitutes *antitrust injury*. The court simply held that, because all petitioners had been found to have committed per se violations of Section 1 and Section 2, "[i]njury to competition is presumed to follow from the conduct proscribed by these Sections. *United States* v. *Topco*, [405 U.S. 596 (1972)]; *Walker* v. *U-Haul Co. of Mississippi*, 747 F.2d 1011 (5th Cir. 1984)." Pet. App. A22. The court failed to modify its analysis of this issue on rehearing, although this Court's opinion in *Atlantic Richfield* was brought to its attention.

2. Although the court of appeals made no fewer than three legal errors, it is not clear that this case warrants plenary review. As we mentioned before, the decision of the court of appeals is unpublished. Although antitrust practitioners may be aware of the court of appeals' decision, it lacks any precedential effect. See Ninth Circuit

Rule 36-3 (unpublished memorandum decisions "shall not be regarded as precedent and shall not be cited to or by this court or any district court in the Ninth Circuit * * * except when relevant under the doctrines of law of the case, res judicata, or collateral estoppel"). In addition, more specific considerations suggest caution in granting plenary review of any of the questions presented.

a. As to the *Copperweld* issue, we are aware of no published decision holding that wholly owned subsidiaries of a common parent can conspire with each other for purposes of Section 1. The Ninth Circuit's published rulings since *Copperweld* have either reserved the issue, see *Wilcox* v. *First Interstate Bank of Oregon, N.A.*, 815 F.2d 522, 527 (1987), or suggested that *Copperweld* should apply to corporate families including multiple wholly owned subsidiaries, see *Lake Communications* v. *ICC Corp.*, 738 F.2d 1473, 1480 (1984). And the four other circuits that have considered the question have had little difficulty concluding that the reasoning of *Copperweld* applies in this situation. *Odishelidze* v. *Aetna Life & Cas. Co.*, 853 F.2d 21, 23 (1st Cir. 1988); *Advanced Health-Care Serv., Inc.* v. *Radford Community Hosp.*, 910 F.2d 139, 146 (4th Cir. 1990); *Greenwood Util. Comm'n* v. *Mississippi Power Co.*, 751 F.2d 1484, 1496 (5th Cir. 1985); *Directory Sales Management Corp.* v. *Ohio Bell Tel. Co.*, 833 F.2d 606, 611 (6th Cir. 1987). See also *Cohen* v. *Primerica Corp.*, 709 F. Supp. 63, 65 (E.D.N.Y. 1989). Cf. *City of Mt. Pleasant* v. *Associated Elec. Co-op.*, 838 F.2d 268, 274-277 (8th Cir. 1988) (under *Copperweld*, a group of related corporations comprising part of a rural electric cooperative are a single economic entity and cannot be found to have conspired).

In addition, the exact relationship among the BTR subsidiaries is less than elaborately developed in the record. Petitioners appear to have presented no evidence at trial on this issue; the only testimony to the relationship came from two of respondents' witnesses, over the objec-

tion of counsel for the Sorbothane petitioners. Tr. 962, 1676-1684. Neither witness professed any expertise in the corporate structure of the BTR companies and one, Laurene Heinsohn, conceded that her knowledge of the BTR corporate structure was hearsay. Tr. 962. Consequently, although the jury instruction upheld by the court of appeals allowed the jury to ignore the affiliation between subsidiaries if it concluded that they operated autonomously, the jury may have found a conspiracy because it did not believe that petitioners presented sufficient evidence of their affiliation.[11]

The panel's reasoning with respect to the *Copperweld* issue is nevertheless troubling. *Copperweld* goes to the heart of the manner in which families of related businesses conduct their operations. Thus, even an unpublished opinion improperly limiting *Copperweld* could have

[11] An additional uncertainty arises because the jury found the Sorbothane petitioners liable for two separate Section 1 violations—a horizontal agreement to divide markets and a vertical agreement to fix resale prices. Special Verdict Form XI-XII. It is difficult to determine whether the *Copperweld* error infected the jury's verdict on the resale price fixing claim. And the resale price fixing verdict alone would suffice to support the entire award of damages, which was the only relief awarded.

The jury found that the Sorbothane petitioners, but not the Spectrum petitioners, had engaged in resale price fixing. Special Verdict Form XI. Thus the jury's verdict, standing alone, would suggest that the jury thought the Sorbothane petitioners had conspired with themselves. But the district court instructed the jury that "resale price fixing * * * is an agreement between firms, at different levels of a chain of distribution to set the resale prices or price ranges for production." Tr. 4328. This raises the possibility that the jury concluded that the Sorbothane petitioners (the manufacturers) conspired to fix resale prices with independent distributors that were not named as defendants in this lawsuit. If that is so, the Section 1 verdict could stand despite the court's misapplication of *Copperweld*. The issue is further complicated, however, by the fact that IEM, one of Sorbothane's principal unaffiliated distributors, distributed medical products rather than athletic products. See Pet. App. A5-A6.

the effect of deterring lawful, procompetitive behavior by commonly owned firms. Consequently, although we do not believe the *Copperweld* issue merits plenary review, we believe it would be appropriate, should the Court wish to do so, summarily to reverse the decision of the court of appeals to the extent that it rests on a holding that wholly owned subsidiaries of a common parent can conspire with each other.

b. The *Lessig* doctrine conflicts with the law of every other circuit and has long been a source of confusion in attempted monopolization cases in the Ninth Circuit. We believe that the *Lessig* doctrine is incorrect, but it remains an established part of the law of the Ninth Circuit. The unpublished opinion in this case does not alter the state of the law.

At the same time, the court of appeals applied *Lessig* in a particularly expansive way by upholding the Section 2 verdict as to the Spectrum petitioners, who were not found to have committed a per se violation of Section 1 of the Sherman Act. That is quite troubling. In its *published* decisions, however, the Ninth Circuit has indicated that, in the absence of predatory or per se illegal conduct, "[m]arket analysis is essential because intent to exclude competition or control prices cannot exist in [a] vacuum; such intent only may exist within the framework of a definable market". *Thurman Indus.* v. *Pay 'N Pak Stores*, 875 F.2d 1369, 1378 (9th Cir. 1989). The court below simply did not discuss *Thurman* in applying *Lessig* to the Spectrum petitioners.

We also believe that the practical importance of *Lessig* has been diminished by the ruling in *Oahu Gas Service, Inc.* v. *Pacific Resources, Inc.*, 838 F.2d 360 (9th Cir.), cert. denied, 488 U.S. 870 (1988). That case holds that potentially anticompetitive conduct will not necessarily lead to antitrust liability under Section 2 if there are legitimate business justifications for the conduct. Under *Oahu Gas*, the *Lessig* rule should not be used to

justify Section 2 liability for unilateral conduct that may be procompetitive.

There is another fact-specific consideration weighing in the *Lessig* balance. Although the *Lessig* issue is properly presented by each petition, it is not clear that rejection of the *Lessig* doctrine would alter the outcome of this case. The *Lessig* issue alone could make no difference to the outcome of the Sorbothane petitioners' case (No. 91-32) because they were found liable on two Section 1 counts. Either of those claims is sufficient to support the jury's entire damages award. The Spectrum petitioners (No. 91-10) were found liable for antitrust treble damages solely on the basis of Section 2. The jury, however, was properly instructed on the elements of monopolization and conspiracy to monopolize, and it appears that the evidence on those theories may be sufficient to support a Section 2 verdict.

c. In this error-ridden decision, the court of appeals—in deciding the issue of antitrust injury—failed even to acknowledge this Court's controlling decision in *Atlantic Richfield*. That case (which reversed another Ninth Circuit antitrust decision) was decided after briefing on the merits and oral argument, but before the court of appeals issued its decision in this case. Then, to compound its error, the court of appeals failed to modify its analysis even though *Atlantic Richfield* was specifically brought to the court's attention in the petition for rehearing, and even though the court modified another portion of its opinion.

We do not assume that the Ninth Circuit will continue to ignore *Atlantic Richfield*. Indeed, the Ninth Circuit has followed *Atlantic Richfield* in a recent published opinion. See *Datagate, Inc.* v. *Hewlett-Packard Co.*, 941 F.2d 864, 868 (1991). In addition, although the court of appeals in this case appears to have presumed antitrust injury from the combination of a per se violation of the antitrust laws and proof that respondents were injured

by petitioners' conduct, the key language of the court of appeals' opinion states only that "[*i*]*njury to competition* is presumed to follow from" per se antitrust violations. Pet. App. A22 (emphasis added). Standing alone, that statement is correct and does not conflict with *Atlantic Richfield*. See 495 U.S. at 342 ("*per se* rule is a presumption of unreasonableness"; a restraint is unreasonable if "its anticompetitive effects outweigh its procompetitive effects"). Moreover, respondents may well be correct in arguing (91-32 Br. in Opp. 17) that the evidence in this case justifies a finding of antitrust injury under the analysis of *Atlantic Richfield*. Despite these considerations, the court of appeals' failure even to acknowledge this Court's decision in *Atlantic Richfield* is striking. Accordingly, we believe it would be appropriate to vacate the court of appeals' decision and remand the case for further consideration in light of *Atlantic Richfield*.

CONCLUSION

For the reasons we have stated, plenary review is not warranted in this case. The Court may, however, wish summarily to reverse the decision of the court of appeals to the extent that it rests on a holding that wholly owned subsidiaries of a common parent may conspire for purposes of Section 1 of the Sherman Act and to remand for reconsideration of the antitrust injury issue in light of *Atlantic Richfield.*

Respectfully submitted.

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